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In the Supreme Court of the United States

OCTOBER TERM, 1946

No.....

CRAWFORD & DOHERTY FOUNDRY COMPANY, an Oregon corporation,

Petitioner.

vs.

PAUL PORTER, Administrator of the Office of Price Administration,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Supreme Court of the United States:

Your Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action was instituted by the Respondent against the Petitioner for the recovery of treble dam-

ages and for injunctive relief under the Emergency Price Control Act of 1942 (R. pp. 2-7). The damages are claimed in part for an asserted violation of General Maximum Price Regulation and in part for an asserted violation of Maximum Price Regulation 244, as these two regulations of the Office of Price Administration related to the sale of gray iron castings.

The facts are as follows:

During the period of time from May 11, 1942, to October 26, 1942, and while General Maximum Price Regulation was applicable, the Petitioner sold to four separate customers, namely, Tuerck-Mackenzie Company, Bingham Pump Company, Willamette Iron & Steel Corporation, and Iron Fireman Manufacturing Company, all of Portland, Oregon, gray iron castings at the same price it had charged another customer (namely, Marine Electric Company), for similar castings during the month of March, 1942, that being the base period. These prices were higher than the prices charged those four customers during the base period; in other words, Petitioner raised its prices to the level of prices established in the base period by sales to Marine Electric Company. Petitioner's contention being that said four customers belonged to the same class as Marine Electric, therefore, the same prices applied to similar castings sold to any of the five customers. Respondent contended that said four customers were not in the same class with Marine Electric Company and that the castings were not similar. The case was tried in the District Court on these issues. The Petitioner offered evi-

dence (R. pp. 201-260) in support of its contention. Respondent offered evidence (R. pp. 261-266) to contradict the fact that the five purchasers were of the same class and that the castings were similar. The Court made Findings of Fact (R. pp. 20-26) sustaining Petitioner's contention.

On appeal to the Circuit Court of Appeals counsel for Respondent adopted a new and different theory as to Petitioner's violation of General Maximum Price Regulation. Counsel there contended that "purchasers of the same class" was not to be resolved upon evidence determinative of classification by the commonly accepted standards of determining classification but that General Maximum Price Regulation was susceptible only of the interpretation that "purchasers of the same class' meant that each "purchaser" was a "class" unto himself. The District Court had never been called upon to pass upon that particular question but had been induced by statements of counsel for the Respondent and actions during the trial to pass on the question of classification as one of fact to be determined by the evidence.

The Circuit Court of Appeal adopted this new or different theory of Appellant as the basis for its decision on this phase of the case.

During the period of time from October 26, 1942, to March 10, 1943, and while Maximum Price Regulation 244 was applicable, the Petitioner sold to the four separate customers heretofore mentioned gray iron castings pursuant to an understanding that the

invoices rendered in connection with such castings would specify prices higher than those approved by the applcable price regulations of the Office of Price Administration, but upon the explicit understanding between the Seller and Purchaser that the Purchaser would pay no more than the amount fixed by the approved price schedule of the Office of Price Administration, that the amount in excess thereof would be retained by the Purchaser and in the event the prices reflected by the invoices were approved by the Office of Price Administration, then and in that event, such Purchaser would pay the balances. Pursuant to this arrangement iron castings were sold and delivered and invoices rendered. The Petitioner collected on such invoices only the amount authorized by price schedules of the Office of Price Administration. The amount retained by the Purchaser pursuant to this arrangement was confirmed by letter written to the Portland office of the Office of Price Administration before this action was instituted. The District Court held that the foregoing arrangement and Petitioner's actions thereunder did not violate the provisions of the Emergency Price Control Act of 1942. It dismissed the action both as to the claims made under General Maximum Price Regulation and Maximum Price Regulation 244.

The Circuit Court of Appeals held the District Court was in error in entering a judgment of dismissal.

JURISDICTIONAL STATEMENT

This action was brought in pursuance of the Emergency Price Control Act of 1942 as amended. The Decree of the Circuit Court of Appeals in reversing judgment of the District Court was signed and entered the 16th day of March, 1946. It is contended that the Supreme Court has jurisdiction to review the judgment here in question under Section 240 Code of Civil Procedure as amended (28 U.S.C.A., Sec. 347 and sub-division (b) paragraph 5 of Rule 38 Supreme Court); that is, the Circuit Court of Appeals has decided an important question of Federal Law which has not been but should be settled by this Court, and the Circuit Court of Appeals has so far departed from the accepted and usual course of procedure as to call for an exercise of this Court's power of supervision.

QUESTIONS PRESENTED

The questions herein presented are:

1. Whether the Circuit Court of Appeals may consider and act upon a new and different theory as to Petitioner's alleged violation of General Maximum Price Regulation than that upon which Respondent submitted his case in the District Court, that is, whether the Circuit Court of Appeals could consider and act upon Respondent's contention that "purchasers of the same class" meant that each purchaser

of himself constituted a class in view of the fact that Respondent had tried the case in the District Court on the theory that what might fall within the term "purchasers of the same class" was a question of fact to be resolved upon proper evidence.

2. Whether the act of submitting invoices on sales of commodities in which the prices specified are higher than those approved in applicable price regulations of the Office of Price Administration and rendered to a Purchaser in pursuance of an explicit understanding between the Seller and the Purchaser that the Purchaser should pay no more than the approved price and that the Purchaser should pay the balance of the price specified in such invoices only if and when such invoice prices should be approved by the Office of Price Administration constitutes:

"selling a commodity in violation of a regulation * * * *"

within the contemplation of Section 205(e) of the Emergency Price Control Act of 1942.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals, although it has been uniformly held that an appellate court will not consider a case on any different theory than that upon which the case was tried in a trial court, entertained and acted upon Respondent's contention that "purchasers of the same class" must be interpreted as

meaning each "purchaser" of himself constitutes a class, notwithstanding that Respondent had tried this case in the District Court on the theory that who belonged to a particular class was a question of fact to be resolved by evidence. Counsel for Respondent not only so indicated by statements to the Court (R pp. 41-42, 45-46, and 50) but he also produced evidence upon this issue (R. pp. 261-266). This is contrary to the uniform rulings on this question. The Circuit Court of Appeals in this case has rendered a decision which is in conflict with decisions of this Court and of the Ninth Circuit of the Circuit Court of Appeal and of other Circuit Courts of Appeal. The Circuit Court of Appeals has by this decision departed from the accepted course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

2. The Circuit Court of Appeals construed the words "selling a commodity in violation of a regulation * * *" as used in 205(e) of the Emergency Price Control Act as comprehending a transaction where Petitioner submitted invoices to Purchasers of gray iron castings and specified therein prices higher than those approved in the schedules approved by the Office of Price Administration. Such invoices were submitted, however, with the understanding between Petitioner and Purchasers that the Purchasers would pay no more than the approved prices. Purchasers would pay the balance shown by the invoices only if and when such invoiced prices should be approved by the Office of Price Administration.

A sale is a contract between two persons to give or pass rights of property for money which the buyer pays or promises to pay to the seller for the thing bought. Title passed to the Purchaser upon delivery and the only price Petitioner expected or the Purchaser intended to pay was that approved by the Office of Price Administration. Any amount paid beyond that covered by the then existing price schedule would be paid only if and when a different price should be approved by the Office of Price Administration.

The action authorized by 205(e) of the Emergency Price Control Act is only such action as might be brought by a Purchaser and such action may be brought by the Office of Price Administration in the event the Purchaser may not bring the action or cannot bring the action by reason of disqualification. Therefore, since none of the Purchasers could have maintained actions against Petitioner for amounts which they had *not* paid, it follows that Respondent might not bring this action. The Circuit Court of Appeals in making its decision has decided an important question of Federal Law which has not been but should be settled by this Court.

WHEREFORE, Your petitioner, referring to the attached brief in support of the foregoing reasons for review, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court for its review

and determination, on a date certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket: "Paul Porter, Administrator of the Office of Price Administration, Appellant, vs. Crawford and Doherty Foundry Company, an Oregon Corporation, Appellee" and that said judgment of the United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Your Petitioner will ever pray.

ROBERT TREAT PLATT,
Counsel for Petitioner.
BARRETT RANDALL,
WILBER HENDERSON,
Of Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1946

No.....

CRAWFORD & DOHERTY FOUNDRY COMPANY, an Oregon corporation,

Petitioner.

vs.

PAUL PORTER, Administrator of the Office of Price Administration,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF COURTS BELOW

The opinion of the Circuit Court of Appeals was rendered on the 16th day of March, 1946 (R. pp. 302-314). The opinion is not as yet officially reported.

JURISDICTION

1. The date of the judgment to be reviewed is March 16, 1946.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Code of Civil Procedure as amended (28 U.S. C.A. Sec. 347).

3. The Circuit Court of Appeals in basing its decision upon a new or different theory than that on which the Respondent had tried this case in the District Court departed from a uniform rule of this Court and other Courts. The decision is in conflict with a rule of universal application. It is in conflict with this Court's rule on this subject matter.

4. The opinion of the Circuit Court of Appeals in holding that Section 205(e) of the Emergency Price Control Act was violated by Petitioner's rendering invoices for amounts in excess of the prices approved although it was understood that such invoices would be paid only in the event such prices were approved by the Office of Price Administration, is in conflict with the plain intent of the Emergency Price Control Act. This case presents an important question of Federal Law that has never been but should be settled by this Court.

STATEMENT OF THE CASE

The facts of this case have been set forth in the preceding Petition (pp. 1-4) which hereby is adopted and made a part of this Brief.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in considering and applying a new and different theory as to purchaser's liability under Section 205(e) of the Emergency Price Control Act than that upon which the case was tried in the District Court. Respondent had tried this case and submitted the same on the theory that "purchasers of the same class" was a question of fact to be resolved by evidence, whereas in the Circuit Court of Appeals Respondents contended that the General Maximum Price Regulation was susceptible only of the interpretation that it meant that each purchaser was of a class unto himself. The Court erred in considering and acting upon the new and different theory.

2. The Circuit Court of Appeals erred in holding that Petitioner violated Section 205(e) of the Emergency Price Control Act upon a state of facts that disclosed that Petitioner *did not* sell the commodities in question at prices in excess of an approved schedule. The rendering of invoices with an understanding that the full amount reflected thereby would be paid only if and when approved by the Office

of Price Administration does not effect a sale at such "invoice price". The sale was effected by delivery and acceptance by the purchaser. Upon payment of the approved price absolute title passed and the sale was completed. The Court erred in holding that Section 205(e) was violated.

ARGUMENT

SUMMARY OF ARGUMENT

Point A. Respondent elected to try this case in the District Court on the theory that "purchasers of the same class" means, purchasers having attributes and characteristics in common so that they are generally regarded as falling within the same category. This was in accord with the interpretations then being promulgated by the Office of Price Administration. Respondent invited the District Court to resolve this question of fact upon evidence. Respondent offered rebuttal evidence to that offered by Petitioner. Respondent contended in the Circuit Court of Appeals that "purchasers of the same class" meant that each purchaser was a class unto himself. The Circuit Court of Appeals in considering and adopting this theory disregarded and held contrary to the uniform rule that an Appellate Court will not consider a new or different theory than that upon which a case has been tried.

Point B. Section 205(e) of the Emergency Control Act makes it unlawful to sell a commodity at a

price in excess of that approved by the Office of Price Administration. If a sale is made in violation of a regulation the purchaser may maintain an action for damages in the amount of three times that by which the consideration paid exceeds the approved maximum price. If the purchaser is disqualified by reason of being one who has bought the commodity for the use in trade or business or does not bring the action himself, the Price Administrator may bring such action. Since there was no sale of the commodity in excess of the maximum price for the reason that the rendering of invoices at a price in excess of the approved price with the understanding, however, that such price will be paid only in the event the price is approved and the purchaser pays only the approved price, there was no violation of Section 205(e). Since the purchaser did not pay any price in excess of the maximum price, he could not recover (assuming he was not disqualified) the difference between the price he actually paid and the full amount of the invoice. There would be nothing to recover. The action the Office of Price Administration may bring is "such suit or action" as the purchaser might bring. If the purchaser has no cause of action, the Office of Price Administration has no action. The basis of the action is the same whether it is the purchaser or the Office of Price Administration. If in a given case the purchaser could not recover because he had not paid a price, it would follow that the Office of Price Administration could not do so.

POINT A

Appellate Court May Not Consider or Act Upon a Different Theory Than That Upon Which the Case Was Tried.

Point A. Respondent by his Complaint (R. p. 4) alleged that Petitioner sold Meehanite gray iron castings during the period from May 11, 1942, to October 26, 1942, at prices higher than the maximum prices for which Petitioner sold said commodity to a purchaser of the same class during the month of March, 1942. No allegation is made that the Purchasers referred to were each of a class unto himself. These allegations were denied by Petitioner (R. p. 9) thereby putting in issue the question of whether Petitioner sold at prices higher than to a "purchaser of the same class."

At the pre-trial conference and at the trial counsel for Respondent stated to the Court that the question of classification was one of fact (R. pp. 41, 43, 45-46). This is illustrated by a typical statement by counsel for Respondent appearing on page 41 of the Record:

> "Our position is that on the four customers that were involved in this particular action, namely, Tuerck-MacKenzie Company, and Bingham Pump Company, and Willamette Iron & Steel Corporation, and the Iron Fireman Manufacturing Company, that the first two stated purchasers of the same class, that the other two also are purchasers of the same class but still a different class."

Evidence was introduced by Petitioner as to classification of Purchasers without counsel for Respondent questioning its materiality. This evidence was offered to establish that Marine Electric Company belonged to the same class of purchasers as Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron & Steel Corporation, and Iron Fire Manufacturing Company. It was Petitioner's contention that Petitioner might avail itself of the highest price charged Marine Electric Company during the month of March, 1942. If this was not an issuable fact, counsel for Respondent should have made known his objection thereto at that time (R. pp. 181-185). Counsel for Respondent cross-examined witnesses of the Petitioner on this issue (R. pp. 193, 185 et seq.). Exhibits 27, 28, and 30 which were offered to establish the base price or the price charged Marine Electric Company were received without objection as to their materiality (R. pp. 207, 215, 233). The only rebuttal evidence offered by Petitioner (R. pp. 261-266) was directed to the sole question of whether or not Marine Electric Company belonged to the same class as Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron & Steel Corporation, and Iron Fireman Manufacturing Company.

At the conclusion the Court made Findings of Fact holding that the evidence had established that the five purchasers were of the same class. Counsel for Respondent made no objection to the Court's making Findings on this issue. Throughout the trial of this case counsel for Respondent proceeded on the

theory that classification was a question of fact to be resolved by proper evidence. Until this case reached the Circuit Court of Appeals no suggestion had been made that Respondent was proceeding on any other theory.

The Circuit Court of Appeals in its opinion refers to isolated statements (Opin. P. pp. 306-7) by counsel for Respondent as the basis for holding that Respondent did not try this case on the theory upon which we contend that he did. These statements, even when read apart from the context and given the most favorable interpretation to that end do not support the conclusion reached by the Court. If these excerpts are examined with respect to what preceded or followed, it becomes apparent that they do not have the meaning attributed to them. The first is a quotation from page 42 of the Record. We will set it out here with the language that followed in the Record. (That which is added for convenience we will italicize.)

> "Then, of course, to me the most important thing to determine whether or not a purchaser falls within the same class is the price that was charged. I think that is probably the most important item to consider.
>
> "*Now, as I say, I don't agree with Mr. Henderson's idea of the formula or the rule which he seeks to establish, but I do feel that the whole question is one of fact and Mr. Henderson has, of course, the privilege of putting on any testimony, any evidence in support of his contention, (11) and of course we have that privilege, too, and it is then up to the Court to determine, as a*

matter of fact, whether or not the prices are to be governed by those charged to the Marine Electric Company, or to be governed by the previous charges to these same purchasers here."

It is thus quite obvious that when the language quoted in the opinion is considered in connection with what followed in the Record that it supports the contention that we are making, viz., that Respondent tried this case in the District Court on the theory that "purchasers of the same class" was a question of fact to be decided on the evidence. The second part of the quotation appearing in the Opinion (R. pp. 306-307) is from page 50 of the Record.

This statement was not used by Counsel for Respondent in respect to General Maximum Price Regulation but was used in respect to Maximum Price Regulation 244. The excerpt in the opinion has nothing to do with Respondent's position as to General Maximum Price Regulation. This is demonstrated by the statement of Counsel made to the Court immediately preceding the remarks from which the quoted part is taken. If reference be made to the bottom of page 49 of the record it will be found that Counsel was reading from Maximum Price Regulation 244, that is for the one using as the base period the time from August 1, 1941 to February 1, 1942. This was Maximum Price Regulation 244. Therefore, when the Counsel made the statement attributed to him in the opinion, he was speaking not in regard to General Maximum Price Regulation but in regard to Maximum Price Regulation 244. It would thus seem

that the excerpt quoted in the opinion does not lend any support at all to the supposition that Counsel for Respondent tried this case in the District Court on any theory other than that which we claim he did, that is "purchasers of the same class" was a question of fact.

Examination of the Record, especially pages 41, 42, 45 and 46, which disclose the Respondent's position, and pages 204, 205 and 206 as to Respondent's position with respect to Exhibit 27, and pages from 233 to 245 with respect to Exhibit 30, which had to do with the question of classification, establish as a fact that this case was tried by Respondent in the District Court on the theory that membership in a classification is a question of fact.

Respondent's position at that time is not to be wondered at. The very language "purchasers of the same class" would indicate to the ordinary person that it took more than one person to make up a "class". One would not suppose that "purchasers of the same class" meant that each person was a class unto himself. Definitions promulgated by the Office of Price Administration through Bulletin No. 1 issued by that agency on the 28th day of April, 1942, specified how membership in a classification was to be determined. If the intention had been to freeze the prices at the particular prices each customer paid during the freeze period, it would seem reasonable to suppose that such specific intention would have been couched in language free from any ambiguity.

When the Office of Price Administration finally promulgated Maximum Price Regulation 244 it specifically provided:

> "That if the seller sold or offered for sale such castings during such period to a specified purchaser, he may not exceed the highest selling or offering price to such purchaser on sales or deliveries to such purchaser."

This language is clear and specific and is a regulation under Maximum Price Regulation 244. If it had been the intention to freeze the prices as to each particular purchaser at the time the Maximum Price Regulation was adopted, it would seem reasonable to suppose that the Office of Price Administration would have adopted language similar to the foregoing.

It has been uniformly held that the theory upon which a case was tried in the lower Court will be the only theory upon which the case is tried or considered on appeal. This Court has so held in the cases of New York L. E. & W. R. R. vs. Estill, 147 U.S. 591; Thomas vs. Taylor, 224 U.S. 73. The Circuit Court of Appeals for the Ninth District has so held in New York Alaska Gold Co. vs. Walbridge, 38 Fed. 2nd 199; Parrot Estate Co. vs. McLaughlin, 89 Fed. 2nd 188 and Beechwood Securities Corp. vs. Associated Oil Co., 104 Fed. 2nd 537.

The opinion of the Circuit Court of Appeals in this case is in direct conflict with all of the foregoing and that Court has so far departed from the accepted and usual course of judicial proceedings as to

call for an exercise of this Court's power of supervision.

POINT B

Section 205 (e) Emergency Price Control Act Is Not Violated Merely by the Submission of Invoices to Purchasers Showing Prices in Excess of Approved Prices If Upon Understanding That Payment Will Be Made Only at Prices as Approved.

The Respondent alleged in his complaint (R. p. 4) that Petitioner violated Section 205(e) of the Emergency Price Control Act by selling Gray Iron Castings to Tuerck-MacKenzie Company and Bingham Pump Company and the Willamette Iron & Steel Corporation, all of Portland, Oregon, at prices higher than he had sold such commodities to purchasers of the same class during the period from August 1, 1941, to February 1, 1942.

The foregoing allegations were denied (R. p. 9) and Petitioner by an affirmative answer (R. p. 15) alleged that the sales made to the purchasers named and during the time referred to were effected through an agreement with such purchaser that the commodities represented in each sale would be invoiced to such purchasers at prices which Petitioner claimed it was entitled to charge under Maximum Price Regulations 244. However, it also was understood and agreed between the Petitioner and such purchasers as part of such sale contract that such purchasers

would retain and not pay to the Petitioner that amount of each invoice in excess of the prices which Respondent claimed were applicable pending the final determination by Respondent and the Petitioner of the prices applicable. Such excess was not paid by any of said purchasers.

The evidence produced by Petitioner was conclusive to the effect that the invoices were rendered under the circumstances as alleged, and not otherwise.

It was established without question that Tuerck-MacKenzie Company, Willamette Iron & Steel Corporation and Bingham Pump Company each had paid only according to the approved price schedule.

Respondent made no attempt to dispute the foregoing. No evidence was offered by Respondent on this issue.

The Court, in accordance with the pleadings and the evidence made a finding as follows (R. p. 22):

> "The court finds that on or about the 13th day of April, 1942, defendant increased its price schedule to Tuerck-MacKenzie and Bingham Pump Company to prices above those theretofore charged said respective purchasers (16) for similar casting; that in the early part of November, 1942, defendant entered into an arrangement with the aforesaid respective purchasers to render invoices for castings delivered to them after that time upon the basis of the increased price schedule, but that notwithstanding such invoices it was understood that such purchasers would pay only upon such invoices the amount determined by computation on the original or unrevised price schedule, or on the basis of the prices

prevailing before the increase, and that the excess or difference between the amount shown by the invoice and the amount paid would be retained by such purchasers pending the determination of the validity of the increased price schedule; that since the early part of November, 1942, the defendant has continued, during the time referred to in plaintiff's complaint, to render to the aforesaid purchaser invoices and to make deliveries and receive payment in pursuance of the foregoing agreement."

Upon the foregoing findings, the Court dismissed the suit.

Sub-section (e) of Section 205, Emergency Price Control Act of 1942, at the time this suit was instituted, read as follows:

"If any person selling a commodity violates a Regulation, order or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action, either for $50.00 or treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater plus reasonable attorneys' fees and costs as determined by the Court. * * * If any person selling a commodity violates a Regulation, order or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this Sub-section, the administrator may bring such suit or action under this Sub-section on behalf of the U.S. * * *"

The foregoing provides that the suit may be brought by the administrator only when such suit may not be brought by the purchaser. The purchaser is limited to bring suit or action "either for $50.00 or

treble the amount by which the consideration exceeded the applicable maximum prices."

Let us apply this provision to the state of facts in this case. Let us assume that Tuerck-MacKenzie did not buy the commodity for use or consumption in the course of trade and was eligible to bring action. What could it ask for? The law says "treble the amount by which the consideration exceeded the applicable maximum prices". Tuerck-MacKenzie paid nothing in excess of the maximum prices. Petitioner received nothing from Tuerck-MacKenzie in excess of the maximum prices. Tuerck-MacKenzie, even if it fell within the category of those who might bring action under the law, would have no cause of suit against the Petitioner for the very obvious reason that Petitioner has received nothing from Tuerck-MacKenzie in excess of the maximum prices. Under Sub-section (e) the Administrator may bring action only when the purchasers do not fall within the proper classification. The basis for such action, however, is the same where the action is brought by the purchaser as when brought by the Administrator.

What was there in the arrangement covered by the Court finding that makes Petitioner a violator of Sub-section (e) of Section 205, Emergency Price Control Act of 1942? No sale was made in violation of the Section. A sale is a contract between two parties who pass title to property for money which the buyer promises to pay to the seller for the things bought. Title to the castings referred to in the find-

ing passed upon delivery. Title in the purchaser became absolute upon the payment of the approved prices. Petitioner's right to make demand for any amount above that originally paid was dependent upon the approval of the Office of Price Administration. A demand not supported by the approval would have been of no avail. The sale was consummated when the delivery was accepted. Petitioner having delivered the castings under the foregoing circumstances could not maintain any claim against the purchaser for any additional amount except only on approval of the Office of Price Administration.

Under the commonly accepted meaning of the word "sale" the Petitioner did nothing in violation of the Price Emergency Control Act in making the arrangements that he did with the purchasers. There is nothing in the Act itself that indicates that the word "Sale" is used in any other than its ordinary meaning.

We have been unable to find that any transaction similar to that under consideration has ever been passed upon by any of the Courts. It seems to us that this is a question that should receive consideration by this Court. It is a question of Federal law and if the transaction herein outlined is in violation of Section 205(e), it should be so declared on no less an authority than the Supreme Court of the United States.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of

its supervisory powers, and that a Writ of Certiorari should be granted and the decision of the Circuit Court for the Ninth Circuit in this case should be reviewed by this Court.

ROBERT TREAT PLATT,
Counsel for Petitioner.

BARRETT RANDALL,
WILBER HENDERSON,
Of Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 161

CRAWFORD & DOHERTY FOUNDRY CO., A CORPORATION, PETITIONER

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion. The findings of fact and conclusions of law of that court appear at R. 19–26. The opinion of the circuit court of appeals (R. 302–314) is reported in 154 F. (2d) 431.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 16, 1946 (R. 314–315). The petition for a writ of certiorari was filed on June

10, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347 (a)).

QUESTIONS PRESENTED

1. (a) Whether the circuit court of appeals erred in applying to the term "purchaser of the same class" as used in the General Maximum Price Regulation (*infra,* pp. 17–18) an allegedly different construction from that urged by the Price Administrator at the trial.

(b) Whether the construction of the above-mentioned term, "purchaser of the same class," urged by the Price Administrator in the trial court was materially different from that later advanced by him in the circuit court of appeals, and applied by the latter court.

2. Whether a manufacturer who sells his commodity above the maximum prices permitted by the applicable price regulation, may avoid the treble-damage provisions of Section 205 (e) of the Emergency Price Control Act (*infra,* pp. 14–16) by showing that he advised the purchaser, subsequent to the sale, to retain the excessive portion of the price pending a future allowance of higher prices by the Price Administrator.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and of the

applicable regulations, are set forth in the Appendix, *infra*, pp. 14–21.

STATEMENT

Petitioner, a corporation existing by virtue of the laws of the State of Oregon and having its principal office and place of business in the City of Portland, Oregon, is a manufacturer of iron castings (R. 20). During the period from May 11, 1942, until October 26, 1942, petitioner as such manufacturer was subject to the provisions of the General Maximum Price Regulation, *infra*, pp. 16–18 (R. 20, 304), and since the end of that period it has been the subject to the provisions of Maximum Price Regulation No. 244, *infra*, pp. 18–21 (R. 21).

The General Maximum Price Regulation froze the prices of thousands of commodities, including the iron castings involved here, at the highest price charged a "purchaser of the same class" for the same commodity during March, 1942. During the period between August 1, 1942, and October 26, 1942, petitioner sold iron castings to several purchasers and charged therefor prices higher than those which it had charged the same purchasers during the base period. However, the prices charged the several purchasers were no higher than those which it had charged during the base period to the Marine Electric Company, another and different purchaser.

Maximum Price Regulation No. 244, *infra*, pp. 18, 21, which became effective with respect to sales of iron castings made after October 26, 1942, established as the maximum prices for such commodities, the highest prices charged by the seller to the same purchaser during the period from August 1, 1941, to February 1, 1942, inclusive. On or about April 14, 1942, petitioner distributed to various purchasers new price lists for iron castings, asking prices higher than the prices which it had charged the same purchasers for the same commodity during the period from August 1, 1941, to February 1, 1942, inclusive; and subsequent to October 26, 1942, iron castings were sold by it at the higher prices (R. 118–119, 122–124, 126–127).

On July 31, 1943, the Price Administrator brought this suit against petitioner, seeking to recover treble damages on account of the sales made to the several purchasers (not including the Marine Electric Company), and seeking to have petitioner enjoined from selling or offering to sell iron castings at prices higher than those established by Maximum Price Regulation No. 244 (R. 2–8).

At the trial, the Price Administrator urged with respect to the sales made during the period when the General Maximum Price Regulation was applicable, that the several purchasers were not "purchasers of the same class" as Marine Electric. He based his argument principally on

the differences in the prices charged during the base period (R. 42), also calling attention to supporting factors, such as location of the purchasers (R. 42) and quantities ordered (R. 45).

The district court found, with respect to the sales of iron castings made during the period when the General Maximum Price Regulation was applicable, that the several purchasers alleged to have been charged excessive prices were purchasers of the same class as the Marine Electric Company, and that since the prices charged such purchasers were no higher than those charged Marine Electric, they did not exceed the prices charged to a "purchaser of the same class" (R. 20–21, 24–25). With respect to sales made subsequent to October 26, 1942, at prices allegedly in excess of those established by Maximum Price Regulation No. 244, the district court found that such prices did not exceed the authorized maximum prices, since the purchasers had been permitted by agreements with petitioner to retain in their possession, respectively, the amounts of the excess (R. 21–25). The district court thereupon dismissed the complaint.

The circuit court of appeals reversed the judgment of the district court, holding that the sales made during the period when the General Maximum Price Regulation was applicable, were not made to purchasers of the same class as Marine Electric, and that such prices were above the

ceiling. With respect to the sales made after Maximum Price Regulation No. 244 became effective, the circuit court of appeals held that the evidence did not show that the agreed prices were at the lawful maximum. It further held that the advice to retain the excessive amounts was a unilateral statement rather than an agreement; that it was not shown to have been given before delivery; and, in fact, that it was not even inferentially shown that the contract of sale had been modified (R. 309).

ARGUMENT

1. Petitioner contends that the court below erred in basing its decision with respect to the violations which occurred prior to October 26, 1942, on a construction of the term "purchaser of the same class", appearing in the General Maximum Price Regulation, which, it alleges, was different from the construction urged by the Price Administrator at the trial and applied by the trial court.

Assuming, without conceding, that the basis of the decision of the court below was a construction of the above-quoted provision of the regulation not urged by the Price Administrator at the trial, we submit that the action of the court below did not constitute reversible error. See *Hormel* v. *Helvering,* 312 U. S. 552, 557–558, wherein this Court upheld the action of the circuit court of appeals in basing its decision on the

applicability of a section of the statute there involved entirely different from the sections relied upon by the Commissioner of Internal Revenue and considered by the Board of Tax Appeals (now the Tax Court). In that case this Court pointed out that the rule which petitioner seeks to invoke here that an appellate court should pass by, without decision, questions not urged below, is not an inflexible practice, and that it should not be applied where to do so would work an injustice.[1] In fact, as pointed out in the *Hormel* decision, the proceedings in *United States* v. *Shelby Iron Co.*, 273 U. S. 571, 579, and *United States* v. *Rio Grande Dam & Irrigation Co.*, 184 U. S. 416, 423, were remanded by this Court because the lower courts had failed to give consideration to phases of the cases involving legal theories not presented. Plainly, then, the rule upon which petitioner relies is not so broad as to require an appellate court, where it is satisfied that a construction suggested and applied below is wrong, to perpetuate the injustice by shutting its eyes to the erroneous construction.

In the case at bar the prior administrative construction (R. 305), which was called to the attention of the appellate court, was in harmony with

[1] This Court has on appropriate occasions decided cases on grounds not urged or considered below. Cf. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Dobson* v. *Commissioner*, 320 U. S. 489.

the construction placed by the court below itself and other circuit courts of appeal on identical language appearing in another price regulation. *Bowles* v. *Wheeler,* 152 F. (2d) 34 (C. C. A. 9), certiorari denied December 10, 1945, No. 499, October Term, 1945; *Bowles* v. *Nu Way Laundry Co.,* 144 F. (2d) 741, 747 (C. C. A. 10), certiorari denied, 323 U. S. 791; *Rainbow Dyeing & Cleaning Co.* v. *Bowles,* 150 F. (2d) 273, 274 (App. D. C.). On the other hand, the construction suggested to the trial court was not in accord with the appellate decisions in those cases. In the circumstances, we submit that the court below was competent to adopt a construction of the regulation which it and other appellate courts had found to be proper in connection with identical language appearing in another maximum price regulation covering other commodities. Hence, it committed no error in adopting a construction of the regulation slightly different from that suggested in the trial court.

In any event, the construction applied to the regulation by the court below does not appear to be materially different in legal theory from that actually urged by the Price Administrator in the trial court. At the trial the Price Administrator indicated that factors such as quantities ordered and location of the purchaser might be relevant in determining whether a purchaser would fall into one class or another, but that the

"most important" consideration for determining whether two purchasers fall within the same or different classes is the price that was charged (R. 41–42). In the appellate court the Price Administrator called attention to the administrative construction of the regulation which made customary difference in price treatment the exclusive criterion for determining whether a purchaser falls within one class or another.[2] Thus, the only difference between the two constructions suggested by the Price Administrator is that in the one price treatment is the most important and guiding factor, and in the other price treatment is the exclusive factor to be considered.[3] We sub-

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[2] By inadvertence this construction had not been presented to the trial court. However, it might well have been judicially noticed by the appellate court. *Bowles* v. *United States*, 319 U. S. 33; *Jones* v. *United States*, 137 U. S. 202. Suggesting this construction to the appellate court could not therefore be regarded as the urging of a new theory. *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 488–489.

[3] Referring to these interpretations, the Circuit Court of Appeals stated (R. 305): "The interpretations establishing the administrative practice under the regulations are that each purchaser to whom an article is sold in March, the base month, constitutes a separate class and the purchases thereafter by such a person are not to be at a price higher than charged to him in March 1942." The court's meaning is illuminated by the interpretations themselves, which are in a footnote to the quoted sentence (R. 305). They clearly indicate that the test of a separate class is whether there was a *practice* of *customarily* charging a different price, rather than casual sales with no continuity of practice: "Frequently, of course, a seller may have had the *practice* of giving a customer special low prices * * *. Thus a seller may have *customarily* given one customer—who by all ob-

mit that the difference is not one of real substance.

2. With respect to the sales made after October 26, 1942, petitioner contends that its advice to its purchasers to retain the excessive portions of the sales prices operated to make the sales legal by depriving them of their character as overcharges. But it is clear that fully consummated overcharges had occurred prior to the time when the advice to retain the excessive amounts was given. Whether the price lists be regarded as continuing offers and the orders as acceptances, or whether the sales were completed when the purchasers confirmed their orders by telephone or direct contact (R. 133), in each case an "overcharge" occurred at the time the sale was made within the meaning of Section 205 (e) of the Act. "Sale" is defined in Section 302 (a) of the Act, *infra,* p. 16, as including "contracts and offers"

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jective tests was exactly like many other customers—a special low price * * *. * * * his class was established by the seller's *practice* of giving him a lower price * * *" (OPA Serv. 11:968–9). "Thus if a laundry *customarily* charged two customers different prices * * *" (OPA Serv. 11:969). [Italics supplied.] In the instant case, there was a continued *practice* of selling to each of the purchasers involved on the basis of different price lists; these lists remained in force for a long period of time and pursuant to them a succession of purchases was made (R. 115–117, 123, 127, 138, 140). Thus the court's reference to the principle that each purchaser cannot be charged more than he was charged in the base period is an accurate, though elliptical, reflection of the administrative interpretations as applied to the facts of this case.

to make sales, dispositions, etc.[4] Hence, the seller who is liable under Section 205 (e) "on account of the overcharge" includes one who has contracted to sell at a price higher than the legally authorized maximum, and accordingly the word "overcharge," as defined in Section 205 (e), "the amount by which the consideration exceeds the applicable maximum price," is broad enough to include the excess above the ceiling price in a contract to sell, notwithstanding that payment has not yet been made.[5]

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[4] In addition, the word "sale" itself is in the definition, which must mean that the ordinary meaning of "sale" is included—which would certainly cover the situation here of contractual agreement, invoicing, and delivery. Under Section 19, Rule 4 (1), of the Uniform Sales Act (enacted in Oregon, *Oregon Compiled Laws Ann.* (1940), § 71–119), title passes when the goods are appropriated to the contract with the express or implied assent of the parties; this probably took place as soon as these castings, made to specification, were manufactured, and occurred, at the latest, at the time of delivery.

[5] The definitions of "maximum price" in Sec. 302 (i) and of "price" in Sec. 302 (b) corroborate the above analysis and produce a complete consistency with the other definitions. Thus "maximum price" is defined as the "maximum lawful price," and "price" is defined as the "consideration *demanded* or received in connection with the sale of a commodity." [Italics supplied.] Hence "maximum price" means the maximum consideration which may lawfully be *demanded* or received in connection with a sale, transfer, etc., or contract of sale, transfer, etc.

Taking into account, then, all of the other definitions, the definition of "overcharge" is to be read as follows: The amount by which the *consideration* exceeds the maximum consideration which may lawfully be demanded or received

Petitioner's liability having become fixed at the times when the sales were made, no subsequent advice given by it to the purchasers to retain a portion of the agreed consideration could relieve petitioner of that liability. The decisions are unanimous that even a refund of a paid overcharge does not relieve the seller of liability growing out of the violation. *Gilbert* v. *Thierry,* 58 F. Supp. 235 (D. Mass.), affirmed, 147 F. (2d) 603 (C. C. A. 1); *Bowles* v. *Leventhal,* 61 F. Supp. 144 (S. D. N. Y.); *Trachtman* v. *Samit,* 62 F. Supp. 176 (E. D. Pa.); *Zwang* v. *A. & P. Stores,* 46 N. Y. S. (2d) 747. And this Court has held that even the subsequent revocation of the regulation does not disturb liability which has once become fixed. *United States* v. *Hark,* 320 U. S. 531.

Petitioner contends that its permission for the purchasers to retain the amounts of the overcharges was part of the original contract. However, as the court below observed (R. 308–309), the record is barren of any evidence to support the contention.[6] Moreover, even if petitioner's

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in connection with the sale, transfer, etc., or *contract* of sale, transfer, etc.

[6] Not only was there no showing that the advice to withhold the excessive portions of the price was given before the contracts of sale were made, but the only reasonable interpretation of the witness' statement that he divided the invoices as to those before October 26 and those after that date and advised the purchasers to retain the amount in question as to the latter (R. 219–220), was that he was referring to segregation of a number of invoices already in existence and that therefore the advice was given *after* delivery and invoicing.

contention were shown to be true, the agreements would still be violative. As stated by the court below, permission to enter into "adjustable pricing" agreements had to be obtained from the Administrator, and could be obtained only upon compliance with specific conditions which had not been met by petitioner (R. 312–313). And an overcharge conditional in form may be as inflationary as other overcharges since it puts pressure upon purchasers to safeguard themselves by seeking to increase prices to their own purchasers (cf. R. 116).

CONCLUSION

The decision of the court below is correct. There are no conflicts of decision, and no question of public importance is presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1946.

APPENDIX

1. Pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23; 58 Stat. 632; 50 U. S. C. App. Supp. IV, 901 et seq.).

Section 205 (e):

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or re-

ceipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

The amendment made by subsection (b),[1] insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall

[1] The reference is to Sec. 108 (b) of the Stabilization Extension Act of 1944 (58 Stat. 632).

be applicable only with respect to violations occurring after the date of enactment or this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.

* * * * *

Section 302 (a):

The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell", "selling", "seller", "buy", and "buyer", shall be construed accordingly.

Section 302 (b):

The term "price" means the consideration demanded or received in connection with the sale of a commodity.

Section 302 (i):

The term "maximum price", as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations.

2. Pertinent provisions of the General Maximum Price Regulation, effective May 11, 1942 (7 F. R. 3153):

SECTION 1. *Prohibition against dealing in commodities or services above maximum prices.*—On and after the effective date of this Regulation, regardless of any contract or other obligation:

(a) No person shall sell or deliver any commodity, and no person shall sell or supply any service, at a price higher than

the maximum price permitted by this Regulation * * *.

SECTION 2. *Maximum prices for commodities and services—General provisions.*—Except as otherwise provided in this Regulation, the seller's maximum price for any commodity or service shall be:

(a) In those cases in which the seller dealt in the same or similar commodities or services during March 1942:

The highest price charged by the seller during such month—

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it; or

(b) (2) * * *

"Highest Price Charged During March 1942."

For the purpose of this Regulation, the highest price charged by a seller "during March 1942" shall be:

(a) The highest price which the seller charged for a commodity delivered or service supplied by him during March 1942;

* * * * *

No seller shall change his customary allowances, discounts, or other price differentials unless such change results in a lower price. The "highest price charged" shall be a price charged during March 1942 to a purchaser of the same class.

SECTION 20 (k) "Purchaser of the same class" refers to the practice adopted by the seller in setting different prices for commodities or services for sales to different purchasers or kinds of purchasers (for example, manufacturer, wholesaler, jobber, retailer, government agency, public institution, in-

dividual consumer) or for purchasers located in different areas or for different quantities or grades or under different conditions of sale.

3. Pertinent provisions of MPR No. 244, effective October 26, 1942 (7 F. R. 8558):

§ 1421.151 *Maximum prices for gray iron castings.*—(a) On and after October 26, 1942, regardless of any contract, agreement, lease or other obligation, no person shall sell or deliver gray iron castings, and no person shall buy or receive gray iron castings in the course of trade or business, at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as § 1421.166; and no person shall agree, offer, solicit or attempt to do any of the foregoing: *Provided,* That (1) if the purchaser shall receive from the seller a written affirmation that to the best of his knowledge, information and belief the price charged does not exceed the maximum price established by this Maximum Price Regulation No. 244 and that the seller has complied with all other provisions (including the filing requirements of § 1421.161) of this regulation, and if in such case the purchaser shall have no knowledge of the maximum price and no cause to doubt the accuracy of the affirmation, the purchaser shall have complied with this section; and (2) where the contract of sale has been entered into on or before October 25, 1942, the parties thereto may make and accept deliveries of the castings required or specified in such contract and the seller may render bills or invoices for such castings to the purchaser at the contract price, subject to adjustment of said price in accordance with

the maximum prices established by this Maximum Price Regulation No. 244 within a period not to exceed 30 days after the billing or invoicing.

* * * * *

§ 1421.152 *Applicability of General Maximum Price Regulation.*—The provisions of this Maximum Price Regulation No. 244 supresede the provisions of the General Maximum Price Regulation with respect to sales and deliveries for which maximum prices are established by this regulation.

§ 1421.156 *Adjustable pricing.* Any person may offer or agree to adjust or fix prices to or at prices not in excess of the maximum prices in effect at the time of delivery. Where a petition or application for amendment or for adjustment or for exception under § 1421.157 has been duly filed, a seller may make sales, deliveries or offers of sale at prices adjustable in accordance with the disposition of such petition or application and shall refund to the purchaser any moneys or other consideration paid which are in excess of the maximum price.

§ 1421.157 *Petitions and applications for amendment, adjustment or exception.* (a) Any person seeking relief from a maximum price or prices established under this Maximum Price Regulation No. 244 for a particular gray iron casting or particular group of gray iron castings, may present the special circumstances of his case in an application for an order of adjustment. Such an application shall be filed in accordance with Appendix B, incorporated herein as § 1421.167, and shall set forth the facts relating to the hardship to which such maximum price subjects the applicant.

(b) Any person seeking general relief from the maximum prices or from the formula or method of determining maximum prices established under this Maximum Price Regulation No. 244 may present the special circumstances of his case in a petition for an order of adjustment or exception. Such petition shall be filed with the Office of Price Administration, Washington, D. C., in accordance with Procedural Regulation No. 1, and shall set forth the facts relating to the hardship to such maximum prices or formula or method subjects the applicant together with a statement of the reasons why he believes that the granting of relief in his case and in all like cases will not defeat or impair the policy of the Emergency Price Control Act of 1942 as amended and of this Maximum Price Regulation No. 244 to eliminate the danger of inflation.

(c) Persons seeking any modification of this Maximum Price Regulation No. 244 or an adjustment or exception not provided for therein, may file petitions for amendment in accordance with the provisions of Procedural Regulation No. 1 issued by the Office of Price Administration.

(d) Supplementary Order No. 9 issued by the Office of Price Administration dealing with applications for adjustment of maximum prices of commodities sold pursuant to Government contracts or subcontracts shall not be applicable with respect to gray iron castings.

§ 1421.166 *Appendix* A: *Maximum prices for gray iron castings substantially the same as those which the seller sold or offered for sale at any time during the period from August 1, 1941 to February 1, 1942, inclusive.* The maximum price for each such

casting shall be the highest net price (after adjustment for all applicable customary charges, discounts, quantity differentials and other allowances in effect for the seller between August 1, 1941 and February 1, 1942, inclusive) at which the seller sold or offered for sale such casting to a purchaser of the same class during the period from August 1, 1941 to February 1, 1942, inclusive: *Provided,* That if the seller sold or offered for sale such casting during such period to a specified purchaser, he may not exceed the highest selling or offering price to such purchaser on sales or deliveries to such purchaser.

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